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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

THE BABCOCK & WILCOX COMPANY,
Petitioner,

v.

REA FORHAN PEDRICK, as Administratrix of the Estate of William J. Pedrick, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 7, 1954.

Opinions Below

The opinion of the District Court (R. 33-38) is reported at 98 F. Supp. 548. The opinions in the Court of Appeals (R. 57-73) have not yet been reported officially; see *infra* pages 16-30.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on April 7, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

In each of the taxable years 1942 and 1943 Petitioner was subject both to the income tax and the excess profits tax. In each year Petitioner's excess profits "credit" (which measured the part of its income that was subject to income tax and exempt from excess profits tax) was increased, upon audit of its returns, so that by reason of such increase in "credit" Petitioner's income tax liability was increased and its excess profits tax liability was decreased in an exactly corresponding amount.

The Collector of Internal Revenue assessed interest against Petitioner in each year on the amount of such increase in income tax liability, computing the interest from March 15, the due date of the return and of the first installment of tax thereunder. However, the Commissioner credited interest on the corresponding reduction in excess profits tax liability only from December 15 of the same year, which was the due date of the last installment of that tax. The result was to charge Petitioner nine months' interest on the amount transferred from excess profits tax account to income tax account.

The question precisely presented on these facts is this: Can the Collector exact interest where on no date is there an actual underpayment of the aggregate installments of two interrelated tax liabilities? It is his contention that interest is due to the Government on deficiencies from the due date of the return (Internal Revenue Code, Sec. 292(a)) but that interest is payable by the Government only from the date on which payments for the year exceed the total tax due for the entire year. (Internal Revenue Code, Sec. 321, second sentence, Sec. 3771(b).)

Statutes Involved

Internal Revenue Code Section 729(a), 54 Stat. 989 (1940):

> "(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter I, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter."

Internal Revenue Code Section 321, 53 Stat. 91 (1939):

> "Sec. 321. *Overpayment of Installment.*—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322."

Internal Revenue Code Section 322, 53 Stat. 91 (1939), 56 Stat. 893 (1942):

> "Sec. 322(a) *Authorization.*—(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

Internal Revenue Code Section 292(a), 53 Stat. 88 (1939), 58 Stat. 246 (1944):

> "Sec. 292. *Interest on Deficiencies.* (a) General Rule.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from

the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion." (The last sentence was added by 58 Stat. 246 (1944) applicable with respect to taxable years beginning after December 31, 1942.)

Internal Revenue Code Section 3771(a) and (b), 53 Stat. 465 (1939):

"SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) RATE.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) PERIOD.—Such interest shall be allowed and paid as follows:

(1) CREDITS.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) REFUNDS.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon."

Statement

The facts are not in dispute. Petitioner paid its 1942 and its 1943 income and excess profits taxes to the Collector of Internal Revenue for the Second Collection District of New York (R. 3, 7-9, 13-15, 21, 24).

For both 1942 and 1943, petitioner's combined income and excess profits taxes were at the maximum combined rate exacted by the Internal Revenue Code, *i.e.* "80 per centum of the corporation surtax net income, computed under section 15" (Internal Revenue Code, Sec. 710(a)(1)) (R. 22, 25).

In the return for each year petitioner elected to use its income credit of zero rather than its invested capital credit, which was in a substantial amount (R. 5, 21, 12, 24). The result was that in its returns as filed petitioner showed a small income tax liability and a very large excess profits tax liability (R. 6, 21, 12, 24). The Commissioner of Internal Revenue, however, readjusted petitioner's tax liabilities on the basis of requiring petitioner to use its invested capital credit (which was a substantial amount) rather than its zero income credit with the result that, to the extent of this adjustment in "credit", petitioner's income tax in each year was increased by a substantial amount and its excess profits tax liability was reduced in an exactly corresponding amount (R. 6-8, 21, 13-15, 24).

The aggregate tax liability of 80 per cent of surtax net income remained exactly the same, the only effect of the change in the "credit" being to change the portion of the total tax payments allocable to each of the two taxes (R. 9-10, 23, 16, 26). In the year 1942 over $400,000 of tax was thus shifted from excess profits to income tax account and in the year 1943 over $600,000 was shifted from excess profits to income tax account (R. 10, 23-24, 16, 26).

Notwithstanding that the adjustment referred to resulted in a mere paper transfer of credits, the Collector assessed against and collected from petitioner interest on the amounts so transferred from March 15, the due date of each return, until December 15 of the same year, the date on which the last installment of tax was due (R. 10, 24, 16, 27).

Petitioner brought suit for refund, in the United States District Court, against the Collector's administratrix, under 28 U. S. C. 1346(a)(1)(ii).

The District Court held that actually there was no deficiency and no overpayment but merely a reallocation of items within the total amount of the taxes, that the Government was not deprived of the use of any money and that to charge the taxpayer with additional interest was unfair and inequitable (R. 38). Accordingly, the District Court gave judgment for the petitioner in the amount of $52,621.84, together with interest as allowed by law (R. 49-50).

The Court of Appeals for the Second Circuit, one judge dissenting, reversed the judgment of the District Court and directed dismissal of the complaint on the ground that under the language of Section 292(a) of the Internal Revenue Code interest on deficiencies runs from the due date of the return, while under the literal language of Section 3771(b)(1) and Section 321 of the Internal Revenue Code interest accrues on overpayments of tax only from the date on which the total of installments paid exceeds the total tax liability for the year. It pronounced the equitable considerations adverted to by the District Court as somewhat dangerous ground, and, insisting upon the formal separateness of the two taxes, concluded that no overpayment of excess profits tax existed in the period from March 15 to December 15 which could bear interest to offset the interest computed upon the corresponding deficiency in income tax (R. 57-66, *infra* pp. 18-23).

Reasons for Granting the Writ and Supporting Argument

The Court below has decided an important question of Federal law which has not been but should be settled by this Court, and has decided that Federal question in a way in probable conflict with applicable decisions of this Court.

Reversing the District Court, the majority of the Court of Appeals for the Second Circuit treated the case as raising an issue of literal statutory interpretation; it considered irrelevant the facts that no money changed hands, that the Government was not deprived of the use of any money, and that the exaction was unfair to the taxpayer. The Court said of the District Court opinion's emphasis upon such facts that

> "however appealing, this is somewhat dangerous ground for the testing of taxes."

Insisting that the income and excess profits taxes were two distinct taxes that should not be treated as one, the Court held that equitable principles of recoupment were not involved and that under Section 321 of the Internal Revenue Code there was not until December 15 any overpayment of excess profits tax that could be applied to the deficiency in income tax as of March 15, the apparently relevant date under Section 292(a) for the purposes of computing interest on deficiencies.

Judge FRANK, dissenting, emphasized that the $52,000 interest exaction rested on the method by which the tax returns had been prepared and not on the amounts paid or payable under them; that in fact the income and excess profits taxes were closely intertwined as applied to this taxpayer since it was subject to the 80% combined rate of taxation under the two taxes; that the doctrine of equitable recoupment in tax matters was an instrument for avoiding injustice and applied where, as in the present case, the

No. 190

JUL 3 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

THE BABCOCK & WILCOX COMPANY,
Petitioner,

v.

REA FORHAN PEDRICK, as Administratrix of the Estate of William J. Pedrick, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN F. DOOLING, JR.,
Counsel for Petitioner,
48 Wall Street,
New York 5, N. Y.

SULLIVAN & CROMWELL,
48 Wall Street,
New York 5, N. Y.,
Of Counsel.

related taxes arose out of a single transaction or taxable event; that the doctrine of the separateness of the two taxes was not without exceptions as the equitable recoupment cases demonstrate; that the authorities relied upon by the majority were not in point; and that a conclusion favorable to the taxpayer was warranted by the language of Section 321 treating overpaid installments as overpayments of tax and Section 322(a)(1) providing for the immediate credit or refund of overpayments of tax.

The question of statutory interpretation is one of great practical significance in the administration of the tax law since the question is not limited in its scope to the excess profits tax but is applicable to the multitude of Federal taxes. The weight of their impost makes it of great practical importance to taxpayers to have clearly settled rules governing the interrelation of their accounts for different taxes with the Government.

In arriving at its decision the Court of Appeals, rejecting the District Court's invocation of basic legal principles as a guide in interpreting the statutes, has given to the statutes a rigid and mechanical reading which disregards the fundamental principle on which all interest is exacted, that is, the existence of an indebtedness which is past due. The Court of Appeals has professed to find in the language of the statutes a positive mandate that interest must be exacted where there is no aggregate delinquency and where no money has been detained from the Government's use; the interest liability it imposed rests solely on the ground that the taxpayer must pay the two segments of his integral tax liability not only in the correct aggregate amount but with a correct allocation of the sub-amounts to the two related taxes even though the two interrelated tax liabilities are payable on the same date under the same code on a pair of integrated tax returns and in respect of different parts of the same aggregate annual income. If the tax law is to be so read—and

Judge FRANK has suggested that if so read it will deserve the characterization of Dickens' Mr. Bumble that "the law is a ass"—we submit that it should only be in consequence of a determination by this Court that the language of the statutes affords no escape from a conclusion that cannot command the assent of reason.

The absurd lengths to which the Government presses its too literal reading of the statute is illustrated by *Central Fibre Products Co.* v. *United States,* 115 F. Supp. 147 (N. D. Ill., 1953), where a taxpayer in filing its original return underpaid its tax by $34,952.93. However, before the final and true tax was ascertained, the Government first thought the taxpayer had overpaid its tax and refunded the taxpayer $65,557.61 with interest from the due date of the last installment. Correcting its error later, the Government assessed a deficiency of $100,510.04 (thus recollecting the erroneous refund and collecting the true deficiency) but charged the taxpayer with interest *from the due date of the return* not just on the $34,952.93 true deficiency but on the whole amount of $100,510.04. Thus the Government exacted nine months' interest on $65,557.61 by a too literal reading of Section 292(a), insisting, as it does here, that interest runs on deficiencies from the due date of the return but runs on refunds only from the date of the last installment. To reverse this picayune exaction and recover the excessive interest of $3,808.32, the taxpayer had to sue and it recovered on the sole authority of Judge HOLTZOFF's now reversed decision in the present case. Manifestly, authoritative guidance in the interpretation of these interest sections is needed to prevent the occurrence of such incredible incidents as the *Central Fibre* case illustrates.

It is further submitted that the decision below is contrary in its construction of interest liabilities to the decisions of this Court. Those decisions, at least as early as 1872 and on down through the recent terms of Court, have

looked to economic realities and not to form in resolving disputes over interest. See especially, *Young* v. *Godbe,* 15 Wall. 562, 565 (1872), as to private obligations, and *Billings* v. *United States,* 232 U. S. 261, 288 (1914), as to Federal excise taxes. In 1947, Mr. Justice BLACK wrote for the Court in *Rodgers* v. *United States,* 332 U. S. 371, 376:

> "As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained."

Heretofore, this Court, in deciding cases involving interest on taxes imposed by the Internal Revenue Code has been guided by fundamental considerations rather than by formal distinctions.

Thus *United States* v. *Childs,* 266 U. S. 304, 309 (1924), concluded that,

> "Interest is put upon [the tax] and so denominated, distinguished from the 5% as penalty, clearly intended to compensate the delay in payment of the tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment."

In *American Propeller & Manufacturing Co.* v. *United States,* 300 U. S. 475 (1937), a taxpayer won judgment on a Government contract for $119,413.04, but the Government won judgment on a counterclaim of $82,701.29 for income and excess profits taxes. The trial court granted to the Government 6% interest amounting to $58,607.64, from the date of assessment of the taxes, but no interest was allowed

on the contract judgment, which had been based on facts occurring prior to the assessment of tax.

The Court stated (p. 478):

> "The inequity of allowing the government interest for 12 years under these circumstances, so as to bring the petitioner in debt to the government in the sum of over $21,000 is so gross as to be shocking."

The Court avoided a square decision on the issue by finding the record deficient in showing the then necessary demand for the payment of the tax and reversed the Court of Claims.

Manning v. *Seeley Tube & Box Co.*, 338 U. S. 561 (1950), involved a net-operating-loss carryback which served to eliminate an underpayment of tax in a prior year. This Court held that the Government was nevertheless entitled to interim interest on the underpayment, since if the tax had been paid when due, the Government would have had the use of money for that interim.

The majority of the Court of Appeals mistakenly construed the *Seeley Tube* case as one rejecting "equitable" considerations and treated it as adverse to Petitioner. But—on the contrary—the *Seeley Tube* case, by its insistence on the fact that the Government was deprived of tax money for an interim period, emphasized what we urge is the controlling equity and in the Government's present case that equity is wholly wanting.

The "underpayment" and "overpayment" here reflected no loss of the use of tax money; they are but two names for aspects of what was a single jural transaction.

Judge FRANK, dissenting below, has, we submit, truly interpreted the sense of the statutes (R. 73, *infra* pp. 29-30):

> "For the foregoing reasons, I think that the income tax and the excess profits tax are not, in a

> case like this, to be considered wholly distinct from one another. If I am correct in this respect, then, the Code points the way to justice here. Section 321 provides: 'If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of the installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayments shall be credited or refunded as provided in § 322.' Section 322(a)(1) provides: 'Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against the income, war profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.' And § 729(a) makes applicable to the excess profits tax all provisions applicable to the income tax which are not inconsistent with the specific provisions of the Chapter in respect of the excess profits tax."

Section 321 is not addressed to the context of interrelated taxes and its true significance in the context of interrelated taxes lies in its characterization of an overpaid installment as an "overpayment" which is available for credit or refund, depending on the state of the taxpayer's accounts with the Government. As an "overpayment" it is essentially interest-bearing under Section 3771 (a) and (b), and when applied as a credit under Section 322(a)(1) or 3770(a)(4) is not deprived of its interest-bearing characteristic. An apparent loss of the interest-bearing characteristic occurs when, under the first sentence of Section 321, such an overpaid installment is applied to any unpaid installment of the same tax, but that is not because the overpayment is not itself interest-bearing but rather because, in that special situation, to accord an interest credit would amount to allowing a forbidden discount for prepaying the particular tax. In the case of

interrelated taxes simultaneously payable on the same installment dates and to each of which Section 321 is alike applicable, the "unpaid installments" referred to in Section 321 may be taken to include not merely the unpaid installments of the one tax but the unpaid installments of both taxes, and in such circumstances the overpaid installment has its immediate application to the simultaneously due and correspondingly underpaid installment of the second tax. The inarticulate error in the decision of the Court of Appeals lies in the failure to perceive that, in the case of interrelated taxes simultaneously due on the same payment dates, Section 321 had to be read in its application to both taxes and not in its application to one only.

This Court has recently granted writs of certiorari in *United States* v. *Koppers Company, Inc.* (to Court of Claims, granted May 17, 1954), and *Premier Oil Refining Company of Texas* v. *United States* (to Court of Appeals, Fifth Circuit, granted June 1, 1954), two cases involving conflicting computations of interest on tax liabilities under Section 292(a). In these cases taxpayers were, after the filing of their excess profits tax returns, granted refund relief under Internal Revenue Code, Section 722 from excessive and discriminatory excess profits taxation. In each case the taxpayer had miscalculated what its excess profits tax liability would be without the benefit of Section 722 relief and so the Commissioner, while he granted refunds under Section 722 without interest (as required by Sec. 3771(g)), set up transitory deficiencies equal to what the excess profits tax would have been if no Section 722 relief had been granted, and he exacted interest on those notional deficiencies, although they were not in fact ever collected since they were expunged by the allowance of the refund relief under Section 722.

The Court of Appeals for the Fifth Circuit construed the statutes as requiring interest on the transitory deficiency because the United States was in fact deprived of

the interim use of money which it was entitled to hold until such time as Section 722 relief was granted; the Court of Claims construed Section 722 relief as expunging the initial duty to pay any tax except that computed after allowance of the Section 722 relief.* In both those cases, the Government would construe the statute in terms of the economic realities, emphasizing that denial to the Government of the interim use of the money is the key to its right to collect interest. Surely if the economic realities furnish the key to the statute's meaning, the decision in the present case cannot stand and is at war with the Government's position in the two cases in which this Court has granted certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN F. DOOLING, JR.,
Counsel for Petitioner,
48 Wall Street,
New York 5, N. Y.

SULLIVAN & CROMWELL,
48 Wall Street,
New York 5, N. Y.,
Of Counsel.

July, 1954.

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* The Court of Claims has recently reaffirmed its position on closely similar facts in *Linn Mills* v. *United States*, Ct. Cl. June 8, 1954, 1954-5 CCH Federal Tax Reporter § 9448.

APPENDIX

Judgment and Opinions Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April one thousand nine hundred and fifty-four.

Present:

HON. CHARLES E. CLARK,
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

THE BABCOCK & WILCOX CO.,
Plaintiff-Appellant,
v.
REA FORHAN PEDRICK, as Admnx., etc.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to the plaintiff's appeal and reversed as to the defendant's appeal and action remanded for the entry of judgment for the defendant in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO
Clerk

OPINIONS OF THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLARK, *Circuit Judge*:

These appeals bring up questions concerning the proper method of computing corporate excess profits taxes for the years 1942 and 1943 and of interest upon asserted deficiencies in their payment. The taxpayers' appeals in both the actions before us present the interesting contention that a corporation may accept a higher tax than the commissioner allows in order thus to take advantage of a higher refund under the statutory post-war refund of 10 per cent herein applicable. And the government's appeal in the first action, taken for the administratrix of the estate of a deceased collector who is the defendant of record in both actions, asserts that interest must be separately assessed in favor of the taxpayer and the government upon offsetting excesses and deficiencies in income and excess profits taxes.

The Internal Revenue Code provides alternative methods of computing excess profits taxes covering the years in question. Section 713 allowed an excess profits credit, in the case of a domestic corporation, of 95 per cent of average net income over a base period. Section 714 alternatively provided for such a credit based upon stated percentages of invested capital. Section 712(a) directed that the credit to be allowed shall be an amount computed under § 713 or § 714, "whichever amount results in the lesser tax under this subchapter * * *" Section 26(e) adjusted ordinary income tax to the excess profits tax by in substance relieving of ordinary tax the amount of income subject to excess profits tax; and § 710(a)(1)(B) placed an 80 per cent ceiling on the combined income and excess profits taxes.

Taxpayers The Babcock & Wilcox Company and The Babcock & Wilcox Tube Company, plaintiff and plaintiffs below in these actions for tax refund, found themselves in a position where under either calculation the 80 per cent ceiling of § 710(a)(1)(B) would govern to limit the total tax. But in 1942 an addition was made, by I. R. C. § 780, to the provisions for this tax (originally established in 1940) whereby upon the cessation of hostilities of the then war, a refund of 10 per cent would apply. With an eye to a greater refund the taxpayers so calculated their returns as to maximize that portion of their over-all 80 per cent liability allocable to the excess profits tax and to minimize that due on the ordinary income tax. Their claim for credit under § 780 calculated on this maximized basis was disallowed and they brought these actions. The only difference in this regard in the two actions is that, as is permissible, the taxpayer in the first action relied on the average net income method of calculation, and in the second on the invested capital method.

The plaintiffs' quite ingenious argument on the issue of tax computation, an argument which Judge Holtzoff rejected below in granting defendant's motions for summary judgments, presents with some elaboration the contention that Congress, since it was granting these alternative methods of tax computation as a measure of relief to hard pressed taxpayers, must have desired such choice to extend to—and to be operable in reverse, so to speak, in—the application of the tax refund later to be made, in order that full measure of relief be accorded. But we agree with Judge Holtzoff that this hardly rises above the level of supposition, however shrewd, and cannot vary the plain language of the statute. We see little, if anything, to be added to his reasoning and, so far as concerns this issue, accordingly affirm on his opinion, D. C. S. D. N. Y., 98 F. Supp. 548-551.

The question of interest requires more extensive consideration. This is presented only in the first action brought

by plaintiff, The Babcock & Wilcox Company, and comes before us upon the defendant's appeal from the grant of plaintiff's motion for summary judgment for the refund. It arises as follows: When the collector recalculated the excess profits tax liability of this plaintiff to find an "overpayment" upon its chosen method of computation, he necessarily found a corresponding "deficiency" of like amount in its ordinary income tax. In accordance with the interest provisions of §§ 292(a) and 3771(b)(1), set forth below, he allowed interest on the overpayment and assessed interest on the deficiency. Due to the different dates from which the two computations run, he determined and assessed a net interest liability of $52,621.84, which plaintiff paid and for which it now sues.

It is plaintiff's position that the government had in its possession at all times all the funds to which it was entitled. Accordingly the overpayment and deficiency were fictitious bookkeeping transactions and the government was in no way injured. Since interest is designed to compensate for lost use of funds, it cannot here apply. This argument found favor in the district court. D. C. S. D. N. Y., 98 F. Supp. 548, 551.

Against this contention based upon equities, the government vigorously urges the specific mandates of the cited statutes. Section 292(a) provides that deficiency interest shall be computed "from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) * * *" This, for each of the years in question, was the following March 15. Section 3771(b)(1) directs that interest on overpayments shall run "from the date of the overpayment," which under § 321 *infra* and *Blair* v. *U. S. ex rel. Birkenstock,* 271 U. S. 348, is the date when the total of installments paid exceeds the total tax liability for the year. In our case this was December 15 following each taxable year.

The district judge did not meet this argument by specific rationale or precedent, but relied generally upon the equities, saying: "No money changed hands. The Government was not deprived of the use of any money. To charge the taxpayer with additional interest under the circumstances is obviously unfair and inequitable." D. C. S. D. N. Y., 98 F. Supp. at 551. But, however appealing, this is somewhat dangerous ground for the testing of taxes. To many persons various parts of the taxing policy seem unfair, *e.g.*, the taxation of capital gains or the entire scheme of progressive taxation. Compare discussion by Randolph Paul in Book Review of Blum & Kalven, The Uneasy Case for Progressive Taxation, in 67 Harv. L. Rev. 725-731. "The Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction." *C. I. R.* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418, 422. And so we must turn to the statutes.

To meet the question of statutory authority plaintiff relies on the broad provisions for statutory setoff and credit on tax overpayment. I. R. C. § 321 provides that if the taxpayer has paid as an installment or in full more than the correct amount "of the tax" the overpayment shall be credited or refunded as provided in § 322; while § 322(a)-(1) provides *inter alia* that overpayment "of any tax imposed by this chapter" shall be credited "against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer." Plaintiff asserts that this context shows the reference to "the tax" as necessarily including both forms of taxes and that hence there was here but a single payment due (in installments) to cover both taxes. But the principle of credit allowances here stated is a broad one, so broad in fact as to make clear that it applies after the offsetting amounts are ascertained and not to their ascertainment. Thus it applies as between different forms of tax, *Kjar* v. *United States*, Ct. Cl., 69 F. Supp. 406, certiorari denied 332 U. S. 768 (income tax and distilled spirits tax), or as against taxes of different years,

Noyes v. *United States,* 9 Cir., 55 F. 2d 870. But it does not and cannot be used to override statutory impositions elsewhere levied, as the cases discussed below (among others) demonstrate. Like considerations apply to the doctrine of equitable recoupment which has been limitedly applied both for and against the taxpayer, *Bull* v. *United States,* 295 U. S. 247; *Stone* v. *White,* 301 U. S. 532; as the later cases strictly restricting application of the doctrine show, it cannot be employed to dissipate specific tax obligations. *C. I. R.* v. *Gooch Milling & Elevator Co., supra,* 320 U. S. 418; *Rothensies* v. *Electric Storage Battery Co.,* 329 U. S. 296.[1]

Returning therefore to the statutes, we perceive that the issue comes down in essence to the question whether the excess profits tax under the Code may properly be considered as a part of the corporate income tax or whether it is essentially a separate tax. For, once it is determined that the tax is separate, the statutory mandate is clear. The tax each year was due, at least in part, and the deficiency arose on March 15. I. R. C. § 56(a, b). There was no overpayment to apply to it until December 15. I. R. C. § 321; *Blair* v. *U. S. ex rel. Birkenstock, supra,* 271 U. S. 348. Whether, thereafter, § 322 would serve to apply the

[1] Both *Bull* v. *United States,* 295 U. S. 247 (the single decision by the Court for the taxpayer), and *Stone* v. *White,* 301 U. S. 532, cite and rely on a doctrine of equitable recoupment of long standing in civil litigation that a claim itself barred by a statute of limitation may be employed to reduce a claim in suit accruing with the recouped claim. See *Huggins* v. *Smith,* 141 Ark. 87, 216 S. W. 1, 16 A. L. R. 323, with annotation at 339-341, and see further annotation at 1 A. L. R. 2d 666 *et seq.* See also discussion and citation in Clark, Code Pleading 666, 667 (2d Ed. 1947), which is an amplification of Clark & Surbeck, *The Pleading of Counterclaims,* 37 Yale L. J. 300, relied on by Judge Goodrich to sustain the taxpayer's recoupment in *Electric Storage Battery Co.* v. *Rothensies,* 3 Cir., 152 F. 2d 521. The reversal of this case in *Rothensies* v. *Electric Storage Battery Co.,* 329 U. S. 296, severely restricting recoupment here to the single transaction, shows that novel extensions of the doctrine thus applicable in the instance of the barred claim will not be tolerated in tax litigation.

overpayment to the deficiency or whether interest arose on both, cancelling each other out, is immaterial. For the interest in dispute arose between March and December when no overpayment existed.

But the point of substantial identity of the two taxes (except of course as to rates) appears to be settled against the contention both by the statutes themselves and by the precedents. The excess profits tax and the ordinary income tax are not one, but are made and levied in separate and distinct manner. They are imposed by separate legislation separately enacted. Thus Subchapter E—Excess Profits Tax, §§ 710-783, was added to the Code by Act of Oct. 8, 1940, and was repealed (for future years) on Nov. 8, 1945, 59 Stat. 568, without impairment of the regular corporate income tax. The point is made quite clear on a careful analysis of the background of the legislation made by Judge Chase in *Superheater Co.* v. *C. I. R.*, 2 Cir., 125 F. 2d 514, 516, in finding the background of the excess profits tax in the former capital stock tax and in affirming a ruling of the Board of Tax Appeals that it did not have jurisdiction to redetermine the excess profits tax of a petitioner on a petition to review the determination of a deficiency only in the ordinary taxes of the petitioner for the same period.[2] Plaintiff objects that this is a matter affecting the jurisdiction of the Board or Tax Court only, and not in point as to an action in the district court; but this is to cite only the ultimate consequence of the decision, and not the persuasive rationale upon which it was based.[3]

The same reasoning has also been applied in the single other case, where the exact issue before us appears to have

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[2] Followed in *Pioneer Parachute Co.*, 4 T.C. 27; *Difco Laboratories*, 10 T.C. 660; *Emeloid Co.*, 14 T.C. 1295, reversed on other grounds, 3 Cir., 189 F. 2d 230.

[3] Not to mention the unique anomaly which would result if important differences in tax levies occurred because of the chance of the court where the taxpayer was able to place himself.

been presented. In *W. G. Duncan Coal Co.* v. *Glenn,* D. C. W. D. Ky., 1952 CCH Fed. Tax Rep ¶ 9434 and 1952 P-H Fed. Tax Serv. ¶ 72,577, before Circuit Judge Martin, the issue was, as here, a question of discrepancy amounting to $4,366.29 for 1943 and $8,507.31 for 1944 between the commissioner's separate computation of interest on excess profits tax deficiencies and income tax overpayments as against the taxpayer's treatment of both taxes as one and computation of interest only on the net deficiencies due the government. In upholding the commissioner's position and dismissing the taxpayer's suit for refund, Judge Martin said: "An analysis of the plaintiff's computation appears to show that income taxes imposed in Chapter 1 and excess-profits taxes imposed by Chapter 2 have been treated as one type of tax. Since the income taxes and the excess-profits taxes are separate and distinct types of taxes there appear to be no provisions of the Internal Revenue Code to warrant the plaintiff's treatment of the two types as one tax for the purpose of computing interest. Interest was properly computed on the several amounts of excess-profits and declared value excess-profits tax deficiencies for each of the fiscal years 1943 and 1944, sought to be recovered. Interest was also computed and allowed on the overpayments of income taxes for the fiscal years 1943 and 1944 and were included in the overassessment determined for the plaintiff."[4]

This decision, squarely contrary to the position taken below, seems to us persuasive in its reasoning. The concept of separate taxable units is of course a fairly usual one in the revenue law, as we have had occasion to hold only recently with reference to different taxable years. *Rosenthal* v. *C. I. R.,* 2 Cir., 205 F. 2d 505, 511; and see also *Helvering* v. *Pfeiffer,* 302 U. S. 247; *Arrowsmith* v. *C. I. R.,* 344 U. S.

[4] In *Central Fibre Products Co.* v. *United States,* D. C. N. D. Ill., 115 F. Supp. 147, Judge La Buy quoted with approval the discussion below as to the equities; but the case there involved merely two computations of the same tax.

6. So on a taxpayer's appeal from the commissioner's determination of a deficiency in tax for 1936, the Board was held without jurisdiction to determine the amount of a 1935 overpayment. *C. I. R.* v. *Gooch Milling & Elevator Co., supra,* 320 U. S. 418. In *Manning* v. *Seeley Tube & Box Co.,* 338 U. S. 561, a taxpayer was held not entitled to a refund of the interest assessed on a tax deficiency which was later abated under the carry-back provisions of the Code by a net operating loss for a later year. *Standard Roofing & Material Co.* v. *United States,* 10 Cir., 199 F. 2d 607, is to similar purport. In cases such as these the equities appear as strong as in the present case; but in them—as here in our view—the provisions of positive law prevented the abatement. This plaintiff, obviously thoroughly advised, took a calculated risk or tax gamble; having failed, it must pay the collector. Its claim for interest refund must therefore be denied.

On the plaintiffs' appeals in both actions the judgments must be affirmed; on the defendant's appeal in the first action the judgment must be reversed and the action remanded for the entry of judgment for the defendant.

FRANK, *C. J.*, dissenting in part (as to the interest):

I agree with my colleagues to this extent: (a) The total tax due, on income and excess profits combined, was precisely, to the penny, what taxpayer reported and paid. (b) The taxpayer in its returns erroneously computed its excess profits, adding to it the precise amount by which it under-stated its income tax. But I disagree with my colleagues that, on account of this error—utterly harmless to the government—some $52,000 (of so-called interest) must be exacted from the taxpayer. My reasons follow:

1. To understand this case, it is essential never to forget that the taxpayer, in computing and reporting, as it did, the two items—income and excess profits—had this sole aim:

to make its excess profits tax larger because the 10% post-war refund, under § 780, applies to the excess profits tax alone, not to the income tax.

To achieve this aim, taxpayer had available either one or two alternative paper plans. Under what I shall call paper Plan I, taxpayer would have computed and reported its income and its excess profits exactly as my colleagues and I hold it should have done (except that perhaps it would have stated in its returns that it believed its reported income was too large in a designated amount, and its reported excise profits too small, in the same amount). It would then have paid a total tax in the exact amount which it did pay. It would then have sued for a refund of that part of its income tax which, according to its interpretation of the Code, it would have overpaid. Had taxpayer won that refund suit, the government, of course, would have re-determined taxpayer's excess profits tax, increasing it by the very amount which taxpayer had been held entitled to recover in its successful refund suit. Thus, through the resultant increase in taxpayer's excess profits tax, the taxpayer would have achieved its sole aim, *i.e.*, increasing its 10% post-war refund of excess profits tax under § 780.

Taxpayer, however, would have lost that refund suit (according to the ruling on which my colleagues and I agree). In that event, it would not have achieved its aim. But—and this is crucial—no one would then, with a straight face have asserted that, because taxpayer had "gambled," and lost, it owed the government some $52,000 for attempting this unsuccessful "gamble."

Instead of using paper Plan I, taxpayer used what I call paper Plan II—which consists of doing what it did: In its return, it augmented its excess profits and decreased its income in the same amount; then, when the Commissioner redetermined its income tax, it paid the consequent assessment and sued for a refund of this assessment. Had it won

that refund suit, the effect would have been the same as the effect of winning the refund suit under Plan I. In other words, either paper Plan, for taxpayer's purpose, was as good as the other if, under either Plan, taxpayer won its refund suit.

But my colleagues hold that losing the refund suit under Plan II costs taxpayer $52,000—although (as we have seen) losing such a suit under Plan I would have cost it zero. So, according to my colleages, a $52,000 liability is imposed on taxpayer for but one reason, namely that, in trying to increase its 10% post-war refund, it resorted to one rather than another paper Plan. The $52,000 thus shows up as a penalty for a mere error in paper-work concerning a single taxable event, an error which in no wise deceived the government and deprived it of nothing whatever. I think that "tax law" deserves the characterization Dickens' Mr. Bumble gave "the law" in general—*i.e.*, "the law is a ass"—if the failure of paper Plan II costs taxpayer one nickel more than would the failure of Plan I.

2. I concede, of course, that, if the statutory language directed such a result, we could do nothing to avoid it. But we should not embrace that result unless explicit statutory provisions leave us no escape. I cannot agree that the Code contains such provisions.

My colleagues rest their conclusion on this thesis: For all purposes under the Code, the income tax and the excess profits tax, due on March 15 of any single year, represent two wholly independent and unrelated taxes, so that, if the income tax is underpaid, the government has been deprived of the use of the amount underpaid from March 15 until it is paid, and therefore has a right to interest on that amount for the intervening period. For only by treating the two taxes as wholly unrelated, can it be said that taxpayer owes such interest, since no one denies that, as the taxpayer paid the total amount of tax when due, the government was not deprived of the use of any money for a split second.

Patently, no wall separates these two taxes. On the contrary, these taxes intertwine. Section 710(a)(1)(B) makes this plain: As my colleagues themselves note, it "placed an 80% ceiling on the combined income and excess profits taxes," and thereby "governs to limit the total tax." Here we have a congressional mandate that the two must be taken together, synoptically regarded. Each becomes a function of the other.

3. My colleagues cite decisions where the problem arose whether the statute of limitations barred the setting off of a claim, otherwise valid, made by either taxpayer of the government, against a valid, unbarred claim asserted by the opponent. I think the course of these decisions goes to show that even over the barrier of a limitations statute, the Supreme Court's doctrine calls for avoidance of injustice when (as in the instant case) a single taxable event is in issue: In *Bull* v. *United States,* 295 U. S. 247 (1935), in a suit by the government for income tax, the Court held that taxpayer, by way of recoupment, could successfully assert an overpayment of estate tax, arising from the same transaction, although the statute of limitations would have precluded an independent suit by taxpayer for the refund of the estate tax. In *Stone* v. *White,* 301 U. S. 532 (1937), the question was whether, in a suit by trustees to recover a tax paid on the income of the trust estate, the government could assert as a counterclaim the tax which had not been paid by a beneficiary (who would receive the benefit of a judgment for the trustees) when the government's claim would have been barred by the statute of limitations, had the government brought an independent suit against the beneficiary; the Court sustained the counterclaim. In *Commissioner* v. *Gooch Company,* 320 U. S. 418 (1943), the Court held that, on a taxpayer's appeal to the Board of Tax Appeals from the Commissioner's determination of a deficiency in income tax for 1936, the Board lacked jurisdiction to determine the amount of a 1935 overpayment

of income tax, the refund of which was barred by the statute of limitations, and to credit the 1935 overpayment against the 1936 deficiency. The Court (p. 421) distinguished *Bull* v. *United States, supra,* and *Stone* v. *White, supra,* because they related to "the scope of equitable recoupment when it is asserted in a suit for refund of taxes in tribunals possessing general equity jurisdiction."

In *Rothensies* v. *Electric Storage Battery Co.,* 329 U. S. 296 (1946), the facts were these: The taxpayer, from 1919 to 1926, had mistakenly paid excise taxes. In 1926—when claims for refund of those taxes for 1919 to 1921 inclusive were barred by the statute of limitations—taxpayer filed suit for refund of the taxes paid between 1922 and 1926. It obtained a judgment, a part of which the government paid in 1935, through a settlement. The Commissioner treated this sum as part of taxpayer's income for 1935, and on this account assessed a deficiency. The taxpayer, having paid this deficiency, sued for a refund. It contended that it had a right to recoup the amount of the excise taxes it had paid in 1919 to 1921 inclusive. The Court, rejecting this contention, distinguished *Bull* v. *United States, supra,* and *Stone* v. *White, supra,* saying (299-300): The doctrine of recoupment in tax cases "has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that *does justice in view of the one transaction as a whole.* The application of this general principle to concrete cases in both of the cited decisions is instructive as to the limited scope given to recoupment in tax litigation. In both cases *a single transaction constituted the taxable event claimed upon and the one considered in recoupment.* In both, *the single transaction or taxable event* had been subjected to two taxes on inconsistent legal theories, and what was mistakenly paid was recouped against what was correctly due."[1]

[1] Emphasis added.

In the instant case, relating to a single year (and with no statute of limitations involved), the taxpayer's income and the excess profits constitute together a "single • • • taxable event." This "transaction which is made the subject of suit" should therefore "be examined in all its aspects, and judgment • • • rendered that does justice in view of the transactions as a whole." As the Supreme Court has said, a suit like this is "equitable in its function."[2] It cannot be equitable to exact a $52,000 penalty based on what is only a bookkeeping re-arrangement of figures.

4. It is true, as my colleagues say, that, generally speaking, each taxable year is a separate unit, a doctrine which sometimes yield injustices. But, even that doctrine, designed to avoid difficulties in the administration of the revenue laws, is, as shown above, not without its exceptions designed to prevent major injustices. As I understand my colleagues, they suggest that, because that doctrine often works unfairness to taxpayers, we should not bother about injustice here, where that doctrine has no application.

5. *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561, and *Standard Roofing & Material Co.* v. *United States*, 199 F. (2d) 607 (C. A. 10), were cases in which the taxpayer attempted to change the basis of the tax. In the case at bar, nothing similar exists: No question here arises as to the amount of taxpayer's income, the only question being the proportion of taxpayer's income allocable to excess profits tax and income, respectively.[3]

6. In *Superheater Company* v. *Commissioner*, 125 F. (2d) 514 (C. A. 2), cited by my colleagues, the decision turned on peculiar provisions of the Code under which the

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[2] *Stone* v. *White*, 301 U. S. 532, 535.

[3] In the *Seeley Tube & Box Company* case, *supra*, the Court expressly left open the interest question where a claimed abatement for deficiency had been asserted before the deficiency was assessed, and this, too, in a loss-carry-back case where the arguments for exacting interest are far stronger than in the case at bar.

Board of Tax Appeals lacked jurisdiction to re-determine excess profits tax of a taxpayer on a review of the Commissioner's determination of a deficiency in income tax. In the instant case, we face no such problem; for this is a suit, brought under 28 U. S. C. § 1346(a)(1)(ii), in the district court which has no such restrictions on its jurisdiction. Our opinion in that case concluded with the statement that "it seems clear that until the jurisdiction of the Board is further enlarged, whatever procedural convenience might be attained by having a formal redetermination of the excess profits taxes in this particular instance must give way to the greater necessity for recognizing and giving effect to the limited statutory jurisdiction of the Board." Note, too, how in *Commissioner* v. *Gooch Company*, 320 U. S. 418 (as pointed out above) the Court, holding that the Board lacked jurisdiction, distinguished (p. 421) *Bull* v. *United States, supra* and *Stone* v. *White, supra,* on the ground that they related to suits not before the Board but to suits "for refund of taxes in tribunals possessing general equity jurisdiction."

In *Rosenthal* v. *Commissioner*, 205 F. (2d) 505 (C. A. 2), the decision (so far as here pertinent) turned on the failure of the Commissioner to file a cross-appeal. Moreover, the court referred to "the settled rule that each taxable year is to be treated as a separate unit for decisional purposes," and that rule is irrelevant here.

7. For the foregoing reasons, I think that the income tax and the excess profits tax are not, in a case like this, to be considered wholly distinct from one another. If I am correct in this respect, then, the Code points the way to justice here. Section 321 provides: "If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of the installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined

to be the correct amount of the tax, the overpayments shall be credited or refunded as provided in § 322." Section 322(a)(1) provides: "Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against the income, war profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer." And § 729(a) makes applicable to the excess profits tax all provisions applicable to the income tax which are not inconsistent with the specific provisions of the Chapter in respect of the excess profits tax.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 190

THE BABCOCK & WILCOX COMPANY, PETITIONER

v.

REA FORHAN PEDRICK, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. PEDRICK, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 33-38) is reported at 98 F. Supp. 548. The opinions of the Court of Appeals (R. 57-73) are reported at 212 F. 2d 645.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1954. (R. 74.) The petition for a writ of certiorari was filed on July 3, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

For the taxable years 1942 and 1943, the taxpayer deliberately overpaid its excess profits tax and underpaid its income tax. Upon audit and assessment of the correct tax amounts, interest was assessed upon the deficiency in income tax from March 15, the due date of the return, pursuant to Section 292(a) of the Internal Revenue Code. Interest was credited upon the overpayment of excess profits tax from December 15, the date of the overpayment, pursuant to Section 3771(b) of the Internal Revenue Code.

The question presented is whether interest may be collected under these circumstances where, because of the 80% limitation of Section 710(a)(1)(B) of the Code, the correct total income tax and excess profits tax liabilities for the years 1942 and 1943 were the same amount as the aggregate of the two taxes reported and paid by the taxpayer.

STATUTE INVOLVED

The statutory provisions involved are Sections 292, 321, 322, 710, 780 and 3771 of the Internal Revenue Code, as set forth in the Appendix, *infra*, pp. 10-14.

STATEMENT

The taxpayer, The Babcock & Wilcox Company, in filing its excess profits tax returns for the taxable years 1942 and 1943, computed its excess profits credit based on income under Section 713 of the Internal Revenue Code in zero amount. (R. 5, 12, 34.) Its excess profits credit if computed under

Section 714 of the Code, based on invested capital, was a positive amount. (R. 4.) The use of the smaller excess profits credit resulted in a larger excess profits tax for those years. The taxpayer's income was such that, regardless of which method was used—income or invested capital—the combined amount of excess profits tax and income tax for each year was the same, because of the provisions of Section 710(a)(1)(B) which limited the amount of excess profits tax to an amount which, when added to its income tax, equalled 80% of its corporation surtax net income, computed without regard to the credit for income subject to excess profits tax provided for by Section 26(e). (R. 5, 11, 34.) Since Section 780 of the Code provided for a 10% postwar refund of excess profits tax, it was to the advantage of taxpayer and its intention to maximize the amount of its aggregate taxes paid as excess profits taxes. (R. 34, 59, 67.)

On audit of the taxpayer's returns for 1942 and 1943, the Commissioner of Internal Revenue recomputed its income and excess profits taxes, using an excess profits credit based on invested capital under Section 714 of the Code. (R. 7, 13.) Since the excess profits credit based on such method was larger than that based on the income method, the Commissioner's computation resulted in a smaller adjusted excess profits net income and a lesser excess profits tax. Accordingly, the credit under Section 26(e) against surtax net income was reduced and taxpayer's income tax was correspondingly increased. Since the excess profits tax so

computed was less than the excess profits tax as computed by the taxpayer, the taxpayer's post-war credit was correspondingly smaller; though the total of its income and excess profits taxes (without taking into consideration the post-war credit) remained the same as before in view of the 80% limitation provision. (R. 16, 26.)

The courts below sustained the Commissioner's determination and held that the taxpayer was required to use the excess profits credit which resulted in the lesser excess profits tax. (R. 37, 60.) No review is sought of the decision on this aspect of the case.

As a result of the recomputations made by the Commissioner and sustained by the courts below there was a deficiency in income tax and an overpayment of excess profits tax for each of the years 1942 and 1943. In addition other adjustments not relevant here increased the total tax liability for each year. (R. 39-48.)

The Commissioner computed the interest due upon the deficiencies in income tax and also computed the interest due to the taxpayer upon its overpayments of excess profits tax. For each of the years in question the taxpayer had paid its taxes in installments, the last installment being paid on December 15, 1943, for the taxable year 1942 (R. 42) and December 15, 1944, for the taxable year 1943 (R. 46). In computing interest due from the taxpayer on the deficiencies in income tax, the Comissioner computed interest from March 15 of each year, under Section 292(a) of the Code.

(R. 37, 40, 44, 61.) In computing interest due to the taxpayer on the overpayments of excess profits tax the Commissioner computed interest from the date of payment of the last installment, December 15, this being the date when the overpayment in excess profits tax accrued. (R. 42, 46.) The Court of Appeals sustained the Commissioner's action. (R. 61.)

ARGUMENT

1. The decision of the Court of Appeals correctly interpreted and applied the provisions of the Internal Revenue Code. It is not asserted to be in conflict with the decision of any other Court of Appeals. It is consistent with the decisions of this Court.

Payment of both taxes is required to be made by March 15 following the close of the calendar year (Code Section 56(a)). However, in the case of a corporation, Congress has provided that the taxpayer may elect to pay the tax in quarterly installments (Code Section 56(b)),[1] a privilege of which this taxpayer took advantage. Where, however, a deficiency in tax exists with respect to a taxpayer paying in installments, Congress has specifically provided that interest should run, not from the respective due dates of the several installments, but rather "from the date prescribed for the payment of the first installment" Code Section 292 (Appendix, *infra,* p. 10). Consequently,

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[1] As amended by Section 5, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

while the taxpayer paid its income tax liability for 1942 and 1943 in quarterly installments during 1943 and 1944 the admitted deficiencies in income tax for these years bore interest from March 15, 1943 and 1944, under the explicit command of the statute just as though there were no privilege of paying in installments and just as though the full amount of the tax were due on that date.

Code Section 3771(b) (Appendix, *infra*, p. 13) contains the provisions regarding the payment of interest with respect to overpayments. The period starts from "the date of the overpayment * * *" When the tax is paid in installments, the date of the overpayment is when the total installments paid exceed the tax owing. *Blair* v. *Birkenstock*, 271 U. S. 348; Code Section 321 (Appendix, *infra*, p. 10). In the present case it is undisputed that the overpayments of excess profits taxes did not take place until the December 15 payments were made in 1943 and 1944. Consequently, the interest on the overpayments began to run from those dates and no earlier.

The taxpayer's contention that the Court of Appeals erred in applying the clear language of these statutory provisions so that interest was due on the income tax deficiency from March 15 while interest on the excess profits tax overpayment was payable from December 15, rests, in the final analysis, on the assumption (Pet. 12-13) that the two taxes are so related that the overpayment of one prevented a deficiency from arising in the other. However, while a definite relationship existed be-

tween the amount of excess profits tax and income tax imposed on a corporation (Code Sections 26(e)[2] and 710(a)(1)(B); Appendix, *infra*, pp. 11-12) the taxes were separate obligations, separately imposed. *Difco Laboratories, Inc.* v. *Commissioner*, 10 T. C. 660; *Emeloid Co.* v. *Commissioner*, 14 T. C. 1295, reversed on other grounds, 189 F. 2d 230 (C. A. 3d). Cf. *Superheater Co.* v. *Commissioner*, 125 F. 2d 514 (C. A. 2d). An overpayment in one tax does not, of itself, prevent a deficiency from existing in the other. Furthermore, taxpayer's argument assumes that it made no difference to the Government whether the amounts paid were treated as income tax or as excess profits tax. Such an assumption overlooks the fact that amounts paid as excess profits tax were subject to a claim for a 10% post-war refund. It also overlooks the different origins and purposes of the two taxes. The fact that an overall ceiling was imposed on the amount to be collected did not make the taxes one tax.

To be sure, if the taxpayer had paid its taxes in accordance with the statutory requirement that it choose the method which results in the lesser excess profits tax, the present problem would not have arisen. Also, if it had paid both taxes on March 15, instead of accepting the privilege of paying in installments, there would have been no deficiency in interest since the deficiency in income tax and the overpayment of excess profits tax would have

[2] As added by Section 105, Revenue Act of 1942, c. 619, 56 Stat. 798.

occurred on the same day. On the facts presented here, however, the result, although it may be unusual, is in accord with the explicit command of Congress regarding the computation of interest, and is correct. In any event, the question lacks general importance.

2. The taxpayer's apparent suggestion (Pet. 13-14) that it would be appropriate to review this case because of the pendency of *United States* v. *Koppers Co.* and *Premier Oil Refining Co.* v. *United States* (Nos. 29 and 41, October Term, 1954), is without merit. Those cases involve the question whether, where there is a deficiency in excess profits tax and the deficiency is later diminished or extinguished by the subsequent granting of relief under Code Section 722, interest is owing on the deficiency from the time the tax was payable until the time when the relief is granted. The question there—whether the subsequent relief operated retroactively to extinguish the preexisting deficiency—bears no resemblance to the peculiar problem posed by this case where the taxpayer is apparently claiming that the overpayment of one tax should be treated as though it were the payment of a different tax.

CONCLUSION

The decision below is not in conflict with the decision of any other Court of Appeals; it is in accord with the applicable decisions of this Court; and it presents no question of general applicability in the administration of the federal tax laws.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HILBERT P. ZARKY,
DAVID O. WALTER,
Special Assistants to the Attorney General.

AUGUST, 1954.

APPENDIX

Internal Revenue Code:

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(26 U.S.C. 1952 ed., Sec. 292.)

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

(26 U.S.C. 1952 ed., Sec. 321.)

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * *

(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 710. IMPOSITION OF TAX.

(a) [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 202 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) 90 per centum of the adjusted excess-profits net income, or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals

80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter).

* * * *

(26 U.S.C. 1952 ed., Sec. 710.)

SEC. 780 [as added by Sec. 250 of the Revenue Act of 1942, *supra*]. POST-WAR REFUND OF EXCESS PROFITS TAX.

(a) *In General.*—The Secretary of the Treasury is authorized and directed to establish a credit to the account of each taxpayer subject to the tax imposed under this subchapter, for each taxable year ending after December 31, 1941 (except in the case of a taxable year beginning in 1941 and ending before July 1, 1942), and not beginning after the date of cessation of hostilities in the present war, of an amount equal to 10 per centum of the tax imposed under this subchapter for each such taxable year. For the purposes of this part, in the case of a taxpayer whose tax is determined under section 710(a)(3), the term "tax imposed under this subchapter" means the excess of the tax imposed by such section 710(a)(3) over the tax that would be imposed if such section 710(a)(3) were not applicable.

* * * *

(26 U.S.C. 1952 ed., Sec. 780.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(1) *Credits.*—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(c) *Additional Assessment Defined.*—As used in this section the term "additional assessment" means a further assessment for a tax of the same character previously paid

in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924, 43 Stat. 253, or by any subsequent Revenue Act.

(26 U.S.C. 1952 ed., Sec. 3771.)

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